MOTION FILED
NOV 16 1995

No. 95-5207 (8)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BYRON KEITH COOPER,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES, AND THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS IN DEVELOPMENTAL DISABILITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAMES W. ELLIS
Counsel of Record
BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-5207

BYRON KEITH COOPER,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3(b) of the Rules of this Court, the American Association on Mental Retardation, *et al.*, respectfully move the Court for leave to file a Brief *Amici Curiae* in the above-entitled case. Counsel for Petitioner has granted his consent to the filing of this brief. Counsel for Respondent has informally notified counsel for *amici* that they will not consent.

Amici include national professional and voluntary associations concerned with criminal proceedings affecting people with mental disabilities. *Amici* thus have expertise concerning criminal defendants with mental disabilities and the nature of their possible incompetence. Although the Petitioner in this case is an individual with mental illness, rather than mental retardation, *amici* are aware that the Oklahoma rule also applies to defendants with

mental retardation. *Amici* wish to present to the Court relevant information from the clinical literature on defendants with mental retardation. *Amici* also wish to address the particular difficulties present when the evidentiary burden is placed on a defendant by clear and convincing evidence.

Amici believe that the Oklahoma statute, providing that a defendant can be found incompetent to stand trial only if the defendant proves incompetency by clear and convincing evidence, will produce trials of substantial numbers of incompetent defendants, and will thereby risk erroneous convictions.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying brief in the present case in support of Petitioner.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. ANY TRIAL OF AN INCOMPETENT DEFENDANT RAISES THE MOST SERIOUS ISSUES OF FAIRNESS 4

II. DEFENDANTS WITH MENTAL RETARDATION FACE A SUBSTANTIAL RISK OF BEING TRIED WHILE INCOMPETENT, AND PLACING AN EXTRAORDINARY BURDEN OF PROOF ON THEM WILL INCREASE THAT RISK UNACCEPTABLY 7

III. PERMITTING STATES TO REQUIRE DEFENDANTS WITH MENTAL DISABILITIES TO DEMONSTRATE THEIR INCOMPETENCE BY "CLEAR AND CONVINCING EVIDENCE" CREATES A SUBSTANTIAL RISK OF MISCARRIAGES OF JUSTICE 12

A. Requiring proof at a level higher than the standard "preponderance of the evidence" reflects a judgment about the acceptability of different types of errors 12

B. "Clear and convincing evidence" is a very heavy burden, which will be understood by triers of fact to require a substantial level of certainty 13

C. Permitting the trial of a defendant unless the factfinder concludes that the proof of incompetence rises to the level of "clear and convincing evidence" will result in the trial of substantial numbers of defendants who lack any real understanding of the proceedings or who cannot assist in their defense 15

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES: Page

Addington v. Texas, 441 U.S. 418 (1979) 12, 13, 15
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 7
Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) 12, 14
Drope v. Missouri, 420 U.S. 162 (1975) 4
Dusky v. United States, 362 U.S. 402 (1960) 6
Godinez v. Moran, 113 S. Ct. 2680 (1993) 4, 6
Medina v. California, 505 U.S. 437 (1992) 5, 16, 17
Pate v. Robinson, 383 U.S. 375 (1966) 4
Penry v. Lynaugh, 492 U.S. 302 (1989) 5
Riggins v. Nevada, 504 U.S. 127 (1992) 6
Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) 13

STATE CASES:

Angela P. v. Ronald P., 623 P.2d 198 (Cal. 1981) .. 14
Fix v. Fix, 847 S.W.2d 762 (Mo. 1993) 14
Estate of Larimore v. Chatterton, 381 N.E.2d 76 (Ill. App. 1978) 14
Matter of C.G., 637 P.2d 66 (Okla. 1981) 14
Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986) 14
Pickens v. Black, 885 S.W.2d 872 (Ark. 1994) 14

STATUTES:

Conn. Gen. Stat. Ann. § 54-56d(b) (West 1994) 12
Okla. Stat. Ann. tit. 22, § 1175.4 (West Cum. Supp. 1996) 12
Pa. Cons. Stat. Ann. tit. 50, § 7403(a) (1995 Cum. Supp.) 12
R.I. Gen. Laws § 40.1-5.3-3(b) (1994 Cum. Supp.) .. 12

STATE JURY INSTRUCTIONS:

Oklahoma Jury Instructions—Civil 3.2 15

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS AUTHORITIES: Page

American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) 8
American Bar Association, *Criminal Justice Mental Health Standards* 7-5.8 (1989) 18
Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. Crim. L. & Criminology 419 (1990) 6, 8
The Criminal Justice System and Mental Retardation: Defendants and Victims (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds., 1992) 7
Daniel, Beck, Herath, Schmitz & Menninger, *Factors correlated with psychiatric recommendations of incompetency and insanity*, 12 J. Psychiatry & Law 527 (1984) 10
Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967) 11
Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 415 (1985) ....*passim*
Everington & Luckasson, *Addressing the Needs of the Criminal Defendant with Mental Retardation: The Special Educator as a Resource to the Criminal Justice System*, 24 Education & Training in Mental Retardation 193 (1989) 10
Everington, *Demographic variables associated with competence to stand trial referral and evaluation of criminal defendants with mental retardation*, 17 J. Psychiatry & Law 627 (1989) 10
Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 Crim. Just. & Behav. 147 (1990) 10
Forte, *The Role of the Clear and Convincing Standard of Proof in Right to Die Cases*, 8 Issues in Law and Medicine 183 (1992) 14
Grisso, *Five-Year Research Update (1986-1990): Evaluations for Competence to Stand Trial*, 10 Behav. Sci. & the Law 353 (1992) 7

TABLE OF AUTHORITIES—Continued

	Page
Heilbrun & Collins, *Evaluations of Trial Competency and Mental State at Time of Offense: Report Characteristics*, 26 Professional Psychology: Research and Practice 61 (1995)	8
Laboratory of Community Psychiatry, Harvard Medical School, *Competency to Stand Trial and Mental Illness* (1973)	8, 9
Luckasson, *The Dually Diagnosed Client in the Criminal Justice System*, in *Mental Retardation and Mental Health: Classification, Diagnosis, Treatment, Services* 354 (Jack A. Stark, Frank J. Menolascino, Michael H. Albarelli & Vincent C. Gray eds., 1988)	9
2 *McCormick on Evidence* § 340 (J.W. Strong ed., 4th ed. 1992)	13
McGee & Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in *Mental Retardation and the Criminal Justice System: Defendants and Victims* 55 (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds., 1992)	11
Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 Cal. W. L. Rev. 365 (1981)	8
Noble & Conley, *Toward an Epidemiology of Relevant Attributes*, in *Mental Retardation and the Criminal Justice System: Defendants and Victims* 17 (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds., 1992)	9
Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471 (1995)	18
Perlin, *Law and Mental Disability* (1994)	5
Perske, *Unequal Justice? What Can Happen When Persons with Retardation or Other Developmental Disabilities Encounter the Criminal Justice System* (1991)	11
Steadman, *Beating a Rap? Defendants Found Incompetent to Stand Trial* (1979)	17

TABLE OF AUTHORITIES—Continued

	Page
Steadman & Hartstone, *Defendants Incompetent to Stand Trial*, in *Mentally Disordered Offenders: Perspectives from Law and Social Science* 39 (John Monahan & Henry J. Steadman eds., 1983)	8
White, Nichols, Cook, Spengler, Walker & Look, *Diagnostic Overshadowing and Mental Retardation: A Meta-Analysis*, 100 Am. J. Mental Retardation 293 (1995)	9
Zetlin & Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment*, in *Lives in Process: Mildly Retarded Adults in a Large City* 93 (Robert B. Edgerton ed., 1984)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-5207

BYRON KEITH COOPER,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

---

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES, AND THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS IN DEVELOPMENTAL DISABILITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae are national professional and voluntary organizations concerned with the interests of citizens who have mental disabilities. *Amici* thus have expertise concerning criminal defendants with mental disabilities and the nature of their possible incompetence.

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. AAMR has appeared before this Court on numerous occasions as *amicus curiae*, most recently in *Romer v. Evans*, No. 94-1039.

THE ARC (formerly the Association for Retarded Citizens of the United States) is an association of parents, family members, professionals, and persons with mental retardation devoted to promoting the interests of people with mental retardation and their families.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of mental health professionals, including psychiatrists, psychologists, social workers, educators, and allied professionals concerned with the problems, causes, and treatment of mental disabilities.

THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES (ANCOR) represents more than 660 agencies nationwide that together support more than 50,000 people with mental retardation and other disabilities. Most of the members operate community residences and support people in their own homes. About 85 percent of ANCOR members are nonprofit agencies. The remainder are proprietary agencies or unincorporated family care homes.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS IN DEVELOPMENTAL DISABILITIES (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

SUMMARY OF ARGUMENT

The prospect of a criminal trial proceeding when the defendant's mental disability renders him incapable of understanding what is happening and unable to assist his counsel is anathema to our system of justice. Such trials certainly were unacceptable at common law. In modern terms, a trial while defendant is unfit to proceed increases the risk of the conviction of an innocent person while, at the same time, impeaching the dignity and reputation of our courts.

Raising the burden of persuasion on the defendant to prove his own incompetence by "clear and convincing evidence" increases the likelihood that incompetent defendants will actually face trial in Oklahoma. To determine whether such an increased risk is tolerable under the Due Process Clause, this Court must first determine whether the risk is increased appreciably by the heavier burden. If, as *amici* believe, the risk is expanded substantially, the Court must then determine whether there is a sufficiently compelling reason that justifies this increased number of cases that will violate the constitutional prohibition against trying unfit defendants.

Amici's analysis focuses on defendants with mental retardation, who clearly fall within the scope of the Oklahoma law. Forensic clinicians generally agree that individuals with mental retardation already pose a substantial problem of undetected incompetence even without the increased burden of persuasion. The "invisible" nature of their handicap is exacerbated by their strong motivation to prevent others from finding out how disabled they are. The result is that truly unfit defendants, a crucial minority of whom may be innocent, will face trials they do not comprehend. Raising the standard of proof can only increase the number of such defendants standing trial. Additionally, *amici's* survey of evidentiary formulations in state law demonstrates that in many states, including Okla-

homa, the interpretation of "clear and convincing evidence" creates an extraordinarily heavy burden of proof on disabled defendants.

The state has two possible motivations for this novel and exceptional law, only one of which is legitimate. The legitimate goal would be to detect malingering defendants. But for defendants with mental retardation, malingering is simply not a practical problem. And even for defendants with mental illness, there is no empirical evidence to suggest (nor any logical reason to suppose) that raising the burden will somehow selectively identify or target those who may attempt to feign incompetence.

The only other motivation for raising the burden to this extraordinary level is to allow for the trial of a greater number of defendants, regardless of whether they are fit to stand trial. This is not a legitimate state purpose.

Since the risk of incompetent defendants standing trial is increased substantially by the Oklahoma law, and since the law does not address directly a substantial problem that outweighs that risk, this Court should hold that it violates the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I. ANY TRIAL OF AN INCOMPETENT DEFENDANT RAISES THE MOST SERIOUS ISSUES OF FAIRNESS.

Following a venerable common law tradition, this Court has repeatedly emphasized that no trial of an incompetent defendant will be tolerated. *Pate v. Robinson*, 383 U.S. 375 (1966); *Godinez v. Moran*, 113 S.Ct. 2680, 2685 (1993). Writing for a unanimous Court, Chief Justice Burger described this principle as "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

The importance that this Court has placed on the prohibition against trying individuals with such severe disabili-

ties that they are not competent derives both from history and contemporary perceptions of fairness. "Few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an 'incompetent' defendant may not be put to trial." Michael L. Perlin, *Law and Mental Disability* 502 (1994); *Medina v. California*, 505 U.S. 437, 446 (1992) ("The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage."). But *amici* are less concerned with tracing the precise lineage of competence jurisprudence through Hale and Blackstone, than with fair treatment of individuals with disabilities and the practical functioning of competence evaluations in the contemporary criminal justice system.[1]

The Due Process requirement[2] that defendants must be competent to stand trial is not merely an artifact of ancient

[1] *Amici* recognize that in determining the requirements of due process in criminal cases there have been differences within the Court on the precise role of historical antecedents and of balancing contemporary equities. *See Medina v. California*, 505 U.S. 437, 453-54 (1992) (O'Connor, J., concurring in the judgment). While recognizing the importance of traditions in making these judgments, *amici*, as organizations concerned with mental disabilities, believe the Court should be aware of the practical consequences of adopting constitutional rules in this area.

[2] Although *amici* remain deeply troubled by the continuing problem of individuals with mental retardation on death row in those states that still permit such executions, *see Amici Curiae* Brief of American Association on Mental Retardation *et al.*, *Penry v. Lynaugh*, 492 U.S. 302, 336 (1989), we do not believe that the Court should decide this case under the Eighth Amendment, as applied to the states by the Fourteenth Amendment. Although this Court's Eighth Amendment cases requiring full and fair adjudication in death penalty cases are certainly broad enough to encompass a ruling prohibiting a state from substantially increasing the risk of a capital trial of an incompetent defendant, *amici* believe that the Due Process Clause offers a preferable source for such a holding. This Court has never suggested that states may be less vigilant in preventing the trial and punishment of incompetent defendants in noncapital cases.

legal concerns. It is central to our courts' assurance to the nation's citizens that all cases involving accusations of crimes are being fairly adjudicated. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring in the judgment).[3]

But in addition to unfairness to defendants, the prohibition on trying incompetent individuals has an additional justification. It has long been recognized that trying a defendant who lacks a basic understanding of the charges and proceedings is an unacceptable affront to the court system itself. Trial of a defendant whose disability renders him unable to comprehend that trial with "a rational as well as factual understanding," *Dusky v. United States*, 362 U.S. 402 (1960), has been analogized to the trial of a defendant *in absentia*. The courts cannot command the respect of our citizens if they allow such sham proceedings. "To proceed against such a person offends the moral *dignity* of the process." Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. Crim. L. & Criminology 419, 426 (1990) (hereinafter Bonnie).

Therefore in the case at bar, there are two basic issues. The first is how greatly the Oklahoma rule placing the burden on the defendant by "clear and convincing evidence" increases the likelihood of a trial of a defendant who does not meet the *Dusky* criteria. And the second

[3] While there is a sense in which the goal of the competence requirement can be characterized as "modest," *Godinez v. Moran*, 113 S.Ct. 2680, 2688 (1993), its function is no less crucial because of its relatively limited expectations of defendants.

issue is whether that increase in the number of trials of incompetent individuals is justified by a sufficiently compelling benefit to the criminal justice system.

Amici are particularly concerned about the unique problems presented by defendants with mental retardation.[4] We believe that placing this extraordinarily heavy burden on defendants who have mental retardation will result in a substantial number of factually incompetent defendants facing trial. We further believe that any hypothesized or anticipated benefit to the criminal justice system from this rule is illusory.

II. DEFENDANTS WITH MENTAL RETARDATION FACE A SUBSTANTIAL RISK OF BEING TRIED WHILE INCOMPETENT, AND PLACING AN EXTRAORDINARY BURDEN OF PROOF ON THEM WILL INCREASE THAT RISK UNACCEPTABLY.

As this Court has recognized, people with mental retardation "have a reduced ability to cope with and function in the everyday world." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). There are few settings in which this is as dramatically true as it is in the criminal justice system. *See generally The Criminal Justice System and Mental Retardation: Defendants and Victims* (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds., 1992) (hereinafter Conley).

Although detailed and reliable empirical data on the rate of referral for evaluations are not plentiful,[5] it is

[4] The case at bar involves an individual whose competence was questioned because of mental illness rather than mental retardation. This Court has never suggested that different rules should be applied, or that different constitutional factors are to be considered, in mental illness cases on the one hand and mental retardation cases on the other. The Oklahoma statute clearly governs both groups of individuals, and *amici* believe that the Court should consider the risk of trying any and all incompetent defendants under that statute.

[5] *See generally* Thomas Grisso, *Five-Year Research Update (1986-1990): Evaluations for Competence to Stand Trial*, 10

widely accepted among scholars, clinicians, and lawyers involved in the criminal justice system that many defendants with mental retardation[6] fail to receive an adequate assessment of their competence to stand trial. *See, e.g.*, Bonnie, *supra*, at 420-21; Ira Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 Cal. W. L. Rev. 365 (1981); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 415, 458 (1985) (hereinafter Ellis & Luckasson); Laboratory of Community Psychiatry, Harvard Medical School, *Competency to Stand Trial and Mental Illness* 6 (1973) (hereinafter Laboratory of Community Psychiatry) ("it is our impression that the competency issue is raised too often for the mentally ill and too infrequently for the mentally retarded"). This is particularly troubling since mental retardation can produce such limitations in the person's abil-

---

Behav. Sci. & the Law 353 (1992); Kirk Heilbrun & Steven Collins, *Evaluations of Trial Competency and Mental State at Time of Offense: Report Characteristics*, 26 Professional Psychology: Research and Practice 61 (1995); Henry J. Steadman & Eliot Hartstone, *Defendants Incompetent to Stand Trial*, in *Mentally Disordered Offenders: Perspectives from Law and Social Science* 39 (John Monahan & Henry J. Steadman eds., 1983).

[6] The accepted definition of mental retardation is that of the American Association on Mental Retardation (AAMR): *"Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). This disability, although often confused with mental illness, has substantially different characteristics. *See generally* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 415, 423-25 (1985).

ity to comprehend the proceedings that the accuracy and fairness of the trial process are compromised.[7] Several attributes common to criminal defendants who have mental retardation make this problem particularly serious.

Unlike many defendants with mental illness, the potential incompetence of individuals with mental retardation is seldom a product of irrational or distorted thought processes (such as delusional beliefs).[8] Rather, mental retardation may render a person incompetent because his intellectual limitations make him incapable of understanding such relatively abstract concepts as the adversarial process. Laboratory of Community Psychiatry, *supra*, at 14 (particular reason for concern about the competence of individuals with mental retardation because of their cognitive deficits "and their characterstic dependency and

---

[7] *Amici* do not mean to suggest, of course, that all defendants with mental retardation are incompetent to stand trial. While many such individuals are competent, and substantially more can be rendered competent by targeted education and habilitation, *see* Ellis & Luckasson, *supra*, at 459-60, the problem remains serious. While reliable data are not yet available, anecdotal experience of clinicians in the field strongly suggests that trials of incompetent defendants who have mental retardation occur with disturbing frequency.

[8] Of course, some defendants who have mental retardation may also be mentally ill. *See* John H. Noble, Jr. & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes*, in Conley, *supra*, at 17, 26; Ruth Luckasson, *The Dually Diagnosed Client in the Criminal Justice System*, in *Mental Retardation and Mental Health: Classification, Diagnosis, Treatment, Services* 354 (Jack A. Stark, Frank J. Menolascino, Michael H. Albarelli & Vincent C. Gray eds., 1988). While the presence of both disabilities may mean that such defendants are more likely to be referred for evaluation on competence issues, the evaluator may fail to identify both disabilities, and if one handicap "masks" the other, the evaluation may not produce an accurate assessment of the individual's functioning. *Id. See also* Michael J. White, Cassandra N. Nichols, Robert S. Cook, Paul M. Spengler, Blain S. Walker & Karsten K. Look, *Diagnostic Overshadowing and Mental Retardation: A Meta-Analysis*, 100 Am. J. Mental Retardation 293 (1995) (gathering most recent research on dual diagnosis).

malleability which permits them to be easily manipulated"). Or the individual's retardation may mean that he lacks the most rudimentary knowledge necessary to meet the *Dusky* test, such as the roles of the major participants in the trial. Ellis & Luckasson, *supra*, at 431.

It might be expected that such gross deficiencies in the knowledge and understanding necessary to be competent under the not-extraordinarily-demanding *Dusky* test would be readily detectable. The underidentification of incompetence among defendants with mental retardation becomes understandable only upon closer examination of the situation in which these individuals find themselves. *See* Ellis & Luckasson, *supra*, at 427-32. One factor is the lack of experience and training of criminal justice system personnel in identifying and dealing with individuals with mental retardation. Caroline Everington & Ruth Luckasson, *Addressing the Needs of the Criminal Defendant with Mental Retardation: The Special Educator as a Resource to the Criminal Justice System*, 24 Education & Training in Mental Retardation 193, 194 (1989). Typically, the possibility of a defendant's incompetence comes to light only when he exhibits behaviors that call attention to his mental illness. Caroline Everington, *Demographic variables associated with competence to stand trial referral and evaluation of criminal defendants with mental retardation*, 17 J. Psychiatry & Law 627, 637 (1989); Ellis & Luckasson, *supra*, at 458 n.242. Even clinicians employed by the criminal justice system to evaluate potentially incompetent defendants focus almost exclusively on the possibility that the defendant's perceptions and understanding may be impaired by mental illness. A.E. Daniel, Niels C. Beck, Adolph Herath, Mark Schmitz & Karl Menninger, *Factors correlated with psychiatric recommendations of incompetency and insanity*, 12 J. Psychiatry & Law 527, 538 (1984); Caroline T. Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 Crim. Just. & Behav. 147, 148-49 (1990).

But the key to the phenomenon of underidentification is that typically an individual who has mental retardation tries to make certain that no one discovers the actual severity of his disability.[9] Although it may initially appear paradoxical or even implausible, it is abundantly clear that defendants with mental retardation continue to make extraordinary efforts to mask the existence and extent of their disability and its effects, even when the revelation and understanding of the handicap would work to their advantage. *See* Ellis & Luckasson, *supra*, at 430-31, 457-58. *See also* John J. McGee & Frank Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System* in Conley, *supra*, at 55, 63 ("many persons with mental retardation are never identified, because they are perceived as quiet, cooperative, and 'normal' in appearance"); Robert Perske, *Unequal Justice? What Can Happen When Persons with Retardation or Other Developmental Disabilities Encounter the Criminal Justice System* (1991) (journalistic accounts).

---

[9] This phenomenon has long been recognized by clinicians and social scientists who study mental retardation. *See, e.g.*, Robert B. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* 148 (1967); Andrea G. Zetlin & Jim L. Turner, *Self-Perspectives on Being Handicapped: Stigma and Adjustment*, in *Lives in Process: Mildly Retarded Adults in a Large City* 93 (Robert B. Edgerton ed., 1984).

III. PERMITTING STATES TO REQUIRE DEFENDANTS WITH MENTAL DISABILITIES TO DEMONSTRATE THEIR INCOMPETENCE BY "CLEAR AND CONVINCING EVIDENCE" CREATES A SUBSTANTIAL RISK OF MISCARRIAGES OF JUSTICE.

A. Requiring proof at a level higher than the standard "preponderance of the evidence" reflects a judgment about the acceptability of different types of errors.

This Court has made clear that a principal function of establishing a standard of proof is "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). "The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 283 (1990). In the instant case, the issue becomes who will bear the risk of error where the evidence about a defendant's competence is not perfectly certain. The Oklahoma statute declares that a defendant must stand trial even if he produces credible proof that he is incompetent by a "preponderance of the evidence" standard unless that proof also satisfies the more burdensome standard of "clear and convincing evidence." Okla. Stat. Ann. tit. 22, § 1175.4 (West Cum. Supp. 1996).[10]

---

[10] Only a few states currently place the burden of demonstrating incompetence on defendants by "clear and convincing evidence" as Oklahoma does. *See, e.g.*, Conn. Gen. Stat. Ann. § 54-56d(b) (West 1994); Pa. Cons. Stat. Ann. tit. 50, § 7403(a) (1995 Cum. Supp.); R.I. Gen. Laws § 40.1-5.3-3(b) (1994 Cum. Supp.). But if this Court were to approve the constitutionality of the Oklahoma approach, it is likely that legislators in other states would seek to adopt such a "constitutionally-certified" measure for limiting the rights of criminal defendants. Each such state would, of course, be incorporating by reference its own prior understanding of the term "clear and convincing evidence."

B. "Clear and convincing evidence" is a very heavy burden, which will be understood by triers of fact to require a substantial level of certainty.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). While acknowledging that jurors, in particular, may not master the precise nuances of differences between various standards of proof, *Addington* made clear that the identification of a standard of proof "is more than an empty semantic exercise." *Id.* at 425 (internal citations omitted). It is the law's method of telling triers of fact how certain they must be before they can reach a certain conclusion.

By requiring proof that a defendant with a mental disability is incompetent by "clear and convincing" evidence, the Oklahoma statute instructs the judge or jury that it must allow the trial to proceed unless its certainty about the proof of incapacity rises to an extraordinary level. To evaluate the constitutionality of this burden, it is important to consider the meaning that courts have ascribed to "clear and convincing evidence."

Although the concept of a burden of persuasion somewhere between "preponderance of the evidence" and "proof beyond a reasonable doubt" may have its origins in the equity cases of chancery courts, *see* 2 *McCormick on Evidence* § 340 (J.W. Strong ed., 4th ed. 1992), much of the impetus for its modern development derives from decisions of this Court prescribing its use for constitutional reasons. *See, e.g., Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) ("clear, unequivocal, and convincing evidence"). In recent decades, the use of this standard has proliferated in both case

law and statutes. *See, e.g., Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

The interpretations of this formulation by state courts reveal the magnitude of the burden it imposes. *See, e.g., Angela P. v. Ronald P.*, 623 P.2d 198, 204 (Cal. 1981) (requiring evidence "so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind") (internal quotations omitted); *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986) ("a standard which is but minutely below the 'reasonable doubt' standard"); *Estate of Larimore v. Chatterton*, 381 N.E.2d 76, 77 (Ill. App. Ct. 1978) ("a quantum of proof which leaves no reasonable doubt in the mind of the trier of fact"); *Fix v. Fix*, 847 S.W.2d 762, 765 (Mo. 1993) ("The evidence must be unquestionable in character. The evidence must be so clear, cogent, and convincing as to exclude every reasonable doubt in the mind of the trial court."); *Pickens v. Black*, 885 S.W.2d 872, 876 (Ark. 1994) ("the evidence must be so strong as to be substantially beyond reasonable doubt"). Similarly, commentators who have addressed the meaning of this standard have described this as an extraordinary burden. *See, e.g.*, David F. Forte, *The Role of the Clear and Convincing Standard of Proof in Right to Die Cases*, 8 Issues in Law and Medicine 183, 185 (1992) ("For most courts, it is the highest standard of proof that can be applied in civil cases.").

Oklahoma's Supreme Court has found that a similarly heavy burden rests on any litigant who must prove a matter by "clear and convincing evidence." "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *Matter of C.G.*, 637 P.2d 66, 71 n.12 (Okla. 1981) (citing as authority cases from the states of Washington, Alaska, Kansas, Oregon, and Colorado.

Since some jurisdictions, like Oklahoma, require or permit competence determinations to be made by juries, judicial explanations of the standard are particularly important when they take the form of jury instructions. The Oklahoma jury instruction, applicable at the time of Petitioner's case, emphasized the defendant's extraordinary burden. Oklahoma Uniform Jury Instructions — Civil 3.2, cited at p.6 of the Petition for Writ of Certiorari ("you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is true, and that this conclusion is unmistakable and free from serious or substantial doubt as to its correctness").

A decade and a half ago, this Court identified "clear and convincing" merely as "intermediate" between "preponderance" and the criminal standard, and speculated that its precise meaning might prove elusive to triers of fact. But it is now clear that many states instruct factfinders that the intermediate standard is an extraordinarily heavy burden on litigants.[11]

C. Permitting the trial of a defendant unless the factfinder concludes that the proof of incompetence rises to the level of "clear and convincing evidence" will result in the trial of substantial numbers of defendants who lack any real understanding of the proceedings or who cannot assist in their defense.

Requiring a jury (or a judge) to find that the evidence of a defendant's trial incompetence is "unmistakable," or that it is "sufficiently strong to command the unhesitating assent of every reasonable mind," or that it produces "a

[11] Of course, it is possible that these explanations of "clear and convincing evidence" by the state courts are more demanding than the burden envisioned by this Court in cases like *Addington* which mandated that governments prove certain matters according to that standard. But the issue in this case is whether the states may constitutionally impose on defendants the burden of demonstrating their own incompetence by "clear and convincing evidence" as it has been formulated in state law.

firm belief or conviction," requires that the defendant face trial if substantial and persuasive evidence falls short of this elevated standard. Enforcement of this rule makes the trial of genuinely incompetent defendants inevitable.

Approval of the Oklahoma statute would vastly increase the risk of incompetent individuals being tried, convicted, and punished. In *Medina v. California,* 505 U.S. 437 (1992), this Court said that states could place the burden of persuasion on the issue of competence on defendants by a preponderance of the evidence. In doing so, the Court observed that it was not substantially increasing the risk of incompetent defendants facing trial because the rule affected only "a narrow class of cases where the evidence is in equipoise; that is where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." *Id.* at 449. Thus, while it is theoretically possible that an incompetent defendant would face trial because the evidence on competence was in absolutely perfect balance, in reality all that *Medina* did was to permit states to require the defendant to come forward with evidence of incompetence, rather than sitting back, uncooperatively, in the hope that the state would be unable to make a showing of his fitness to stand trial. As Justice O'Connor observed, "States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession." *Id.* at 455 (O'Connor, J., concurring in the judgment).

By contrast, raising the burden on defendant from "preponderance" to "clear and convincing" will add nothing to that incentive, since the defense would need no further inducement to produce all the evidence of incompetence in its possession. The state's reason for raising the burden on defendant must be sought elsewhere.

Since a heightened burden is unnecessary to address cases in which no evidence is presented, and since it is also unnecessary to encourage the defense to present evidence

it has of defendant's incompetence, its only justification must be that the state wants the opportunity to try, convict, and punish some of the defendants who can persuade the trier of fact, by a preponderance of the evidence, that they are unfit for trial. There may be a public demand for the punishment of the individual thought to be responsible for a particular crime, coupled with the perception that incompetence to stand trial is a legal technicality whose only function is to frustrate the criminal justice system. *See generally* Henry J. Steadman, *Beating a Rap? Defendants Found Incompetent to Stand Trial* (1979). Reduced to its essentials, the state's interest in raising the defendant's burden above preponderance is nothing more than the desire to try and to win more cases.[12] Such a justification cannot outweigh the risk of erroneous conviction that is inherent in any trial of an incompetent defendant.

Another concern that may be relevant to the issue of the standard of proof is the possibility that some defendants may "feign incompetence in order to avoid trial." *Medina,* 505 U.S. at 455 (O'Connor, J., concurring in the judgment). As a simple matter of logic, of course, any increase in the difficulty of establishing incompetence will reduce the number of persons found unfit, and some of those "screened out" by the heightened standard may be malingerers.[13] But there is no empirical support for the proposition that raising the standard of proof will selectively identify malingerers.

It is also important to note that whatever the prevalence of malingering may be in the area of mental illness, it is

---

[12] Indeed, if Oklahoma succeeds in its claim that the Due Process Clause permits requiring the defendant to prove his incompetence by "clear and convincing evidence," it is unclear why a state could not require defendant to prove his incompetence beyond a reasonable doubt.

[13] The same would be true, of course, if the state raised the barrier to proof "beyond a reasonable doubt," or if it lifted the ban on trying incompetent persons altogether.

substantially less likely among defendants with mental retardation. First, it would be extraordinarily difficult to feign mental retardation convincingly. This is true both because of the nature and design of the psychometric instruments available to measure intelligence, and because individuals who have mental retardation have had it since childhood,[14] and generally have a "paper trail" of identification of their disability in school and social service records.[15] Additionally, malingering is not a real world problem in mental retardation cases because of the characteristic efforts by these defendants to attempt to mask the true severity of their disability.[16]

Any criminal trial of a factually incompetent individual impeaches the credibility and the very legitimacy of the criminal justice system. Trials of defendants who do not understand the proceedings, or who cannot assist counsel, carry the real prospect of valid alternative theories of the case that remain unexplored, exculpatory evidence that is not presented, potentially false confessions that go unchallenged,[17] and meritorious defenses that no one can raise. Such trials raise the likelihood of the conviction

---

[14] By definition, mental retardation must be manifested before age 18. *See supra* note 6.

[15] It is even more unlikely that a defendant who actually does have mental retardation could successfully feign legal incompetence in the *Dusky* sense. Even if they were motivated to appear less knowledgeable and aware than they actually were, individuals whose measured intelligence is in the lowest 2½ percent of the population cannot plausibly be expected to be very good at calibrating their "pretended" deficits with any degree of sophistication or credibility.

[16] If anything, individuals with mental retardation are characteristically "anti-malingerers," seeking to appear smarter and more knowledgeable than they actually are.

[17] False confessions are a particular problem with defendants who have mental retardation. *See* American Bar Association, *Criminal Justice Mental Health Standards* 7-5.8, Cmt. at 308-310 (1989); Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471 (1995); Ellis & Luckasson, *supra*, at 445-52.

and punishment of innocent persons to an intolerably high level.

CONCLUSION

For the aforementioned reasons, *amici* urge reversal of the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

November 16, 1995